CRITICAL SIGNS OF PUBLIC PROCUREMENT IN A TRANSITIONAL COUNTRY

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ABSTRACT. Transparency and equal opportunity have been achieved in a controversial way in public procurement since the democratic transformation of Hungary in 1989. The transition period in public procurement has not finished yet. Protectionism has been increased by the crisis while the demand for pushing back corruption is becoming overwhelming. The pressure is increasing to use public procurement as a general problem-solving tool. The crisis strengthens those critical elements, which reduce competition and effectiveness of public procurement. The paper is based on the results of a survey questionnaire showing the public procurement conditions of a Central-European EU-member state, which has been doing it on its own way for two-decades. Our conclusions make it clear that the regulation of public procurement and the general attitude of the players have hardly been able to prevent unfair competition so far, although there are some positive signs, which help real competition and transparency.

INTRODUCTION

The parlance of public procurement market in Hungary tends to focus on legal problems. The crises and the budgetary problems drew attention to the opportunities of using public procurement as a standard solution to spend less money and additionally to cut budget deficit. The importance of the topic is emphasised by the fact, that the regulatory system has been modified nearly 30 times since 2004 (joining the EU), without considering any implications. That is why our aim was to monitor and analyse the further implications of these irregularities in the Hungarian Public Procurement market.

The Corvinus University of Budapest conducted several surveys asking relevant questions from public procurement experts and legislators about their opinion and feelings concerning e.g. ethical problems, efficiency, transparency, overregulation and competition in the Public Procurement market. Our research process has involved

several questionnaires (Tátrai [2006]), conducted in a 4-year-period and this study is based on the most recent and most developed one, completed in 2009. In the questionnaire we used close questions and the respondents had to perform a SWOT-analyses in order to highlight the respondents' personal references. The number of respondents (the average is more than 120) and the quality of the answerers show that the public procurement experts understood the aim of the research and could focus on the real problems and opportunities of public procurement. Respondets mainly included experts, regulators, bidders, representatives of contracting authorities and members of organisations representing the general interest of public procurement. So the sample cannot be regarded as a representative one.

The focus of the study is to show the misinterpretation of the EU directives, the wrong and distorted practices, leading to an inefficient way of spending public money, made even worse by the effect of the general crisis.

OVERVIEW OF THE HUNGARIAN PUBLIC PROCUREMENT MARKET

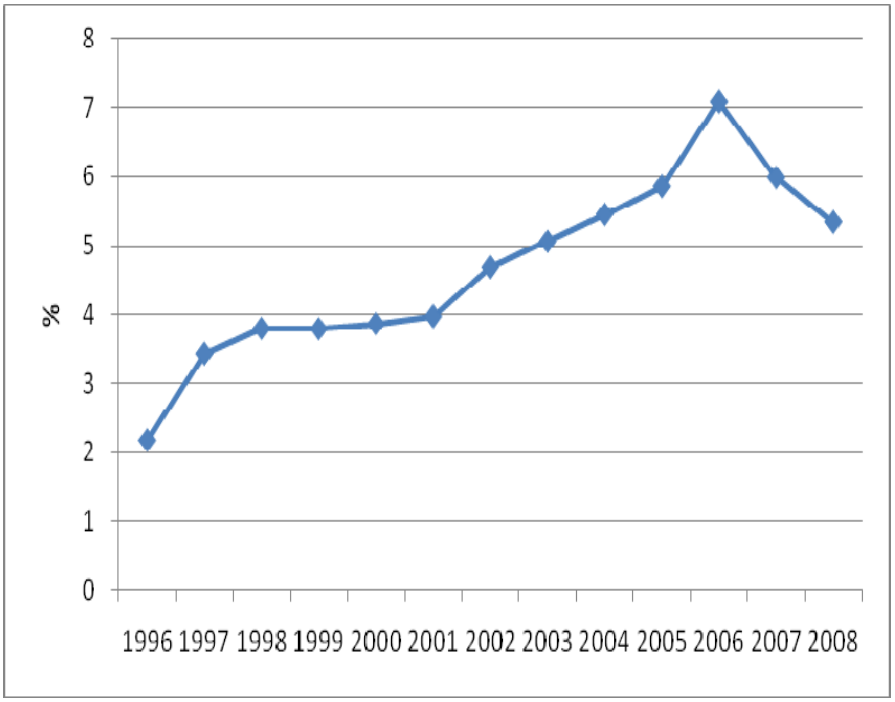
Our knowledge concerning public procurement market is still quite limited. We have only very little information about the market players and their actions, about their purchasing practices (what is purchased at what price) and about the important factors influencing certain changes in these practices, that deeper conclusions could be based on. This paper analyses the presently available data, the official statistics of the Report[1] of the Public Procurement Council prepared for the Hungarian Parliament, and all the aspects concerning competition of the 2009 survey-questionnaire called "Moral and Efficiency in Public Pprocurement" done by Budapest Corvinus University.

From various Parliamentary reports of the Public Procurement Council (1996-2008) we selected all the data regarding competition. One of the most interesting data is the indicator that shows how the value of procurement agreed in the public procurement contracts has changed in the percentage of the GDP. As the EU average is above 10%, it is surprising that this ratio has been declining since 2006.[2]

Figure 1

The value of procurement agreed in the public procurement contracts in the percentage of the

Hungarian GDP (1996-2008)



The data do not show exactly which players of the public procurement market have reduced their spending on the public procurement market, but some practical reasons for this behaviour can certainly be identified.

Withdrawal of the Utility Companies

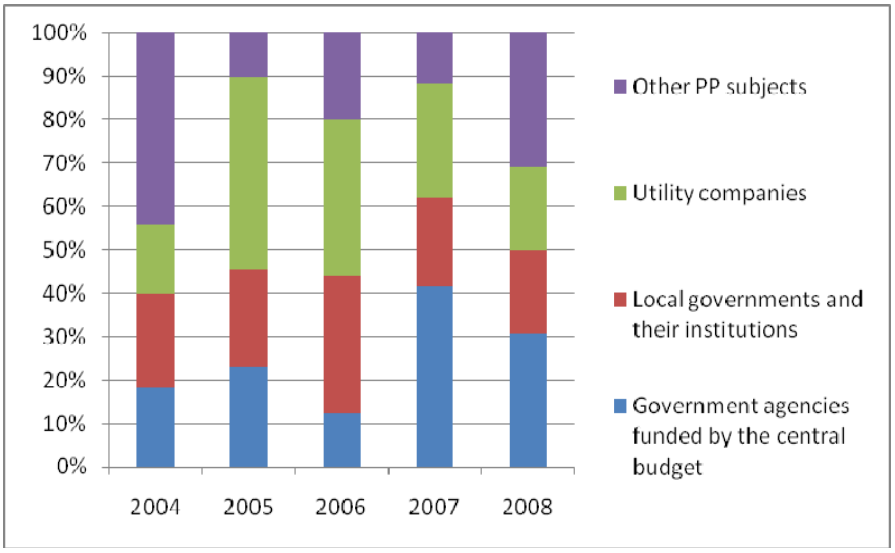
The first and perhaps most important is the fact that the new Public Procurement Law was significantly modified in 2006, which have been followed by many more, unstructured, badly prepared and contradictory modifications. According to the market players the CXXIX Public Procurement Law of 2003 (hereinafter PPL) is overcomplicated, over regulated and resulted in legal uncertainties with enhancing the risks of any legal remedies. One reason for withdrawing from the public procurement market is definitely the frequently changing and unpredictable character of the regulations. The utilitity companies (public service providers) that are the most flexible players of market and indirectly often operate on a

competitive market spending public money decide to use public procurement only when it is absolutely necessary and interpret it with creative understanding of the law as something, which is not directly linked to public services. It can be done quite freely by those public service providers who are owned not by the state or local government but are private companies and for this reason they are obliged to use public procurement only for procurements directly linked to specific activities by 2004/18. EU Directive.

Figure 2

The share of different types of contracting authorities regarding the values of public procurements

(1996-2008)



Our conclusion is supported by Figure 2 above, showing that the amount of money spent by utility companies has been gradually declining since the 2005 peak, which indicates that after the introduction of the new PPL and after gaining the first experiences utility companies have been gradually withdrawing from the public procurement market. It means a more than 50% reduction in value, from 572 billion HUF[3] (approx. 2.907.981.698 USD) to 264 billion HUF (approx. 1.336.032.388 USD) in three years. Beside this drop there is of course a balancing factor of the appearance and activities of subsidised organisations on the public procurement market, so the dramatic decline becomes critical in the year of 2008 compared to the data from previous years. The main problem is, that at the moment there is no way to prevent the continuous law breaking, since it is not in the interest of the constant suppliers of the utility companies to

raise the issue of avoiding public procurement, what is more, it is often the case that a particular utility company is a sole player on a given partial market with their procurements directly linked to their public service activities, so neither parties are willing to be involved in the unreasonable administrative and bureaucratic processes of public procurement.

Fear and Frequent Use of Legal Remedies

One reason why contracting authorities tend to avoid public procurement is the fear of legal remedies and frequent use of legal remedies.

Figure 3

Amount of fees sanctioned by the Public Procurement Arbitration Board in 2008

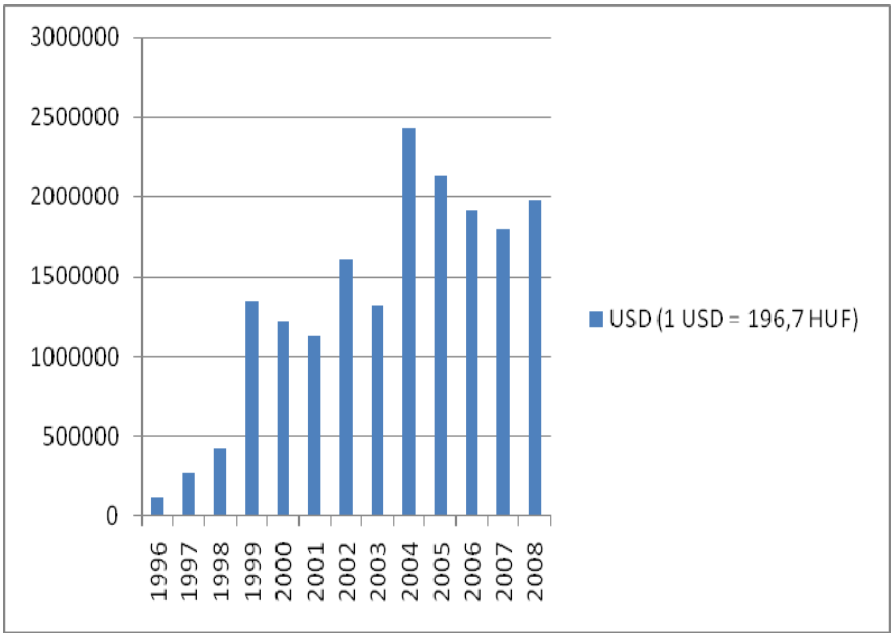


Figure 3 above clearly shows that with the expansion of the public procurement market, which meant a change in the definition of organisations regulated by the PPL, and as a result with the appearance of utility companies running relevant operations, and with the adoption of principal directing regulations and with the whole new regulating environment the amount of fees sanctioned by the Public Procurement Arbitration Board – which after a gradual decline in 2007 started to increase again – has dramatically increased. The average amount of fees relative to the number of completed procedures has declined since 2004, but the average amount of legal

remedy fees – after a decrease in 2004 – has gradually increased and in 2008 it reached and topped the 2004 level. Which means that in average the lawbreaker had to pay a 612.000 HUF (approx. 3.111 USD) fee, plus the procedure initiating fee, which depending on the nature of procedure in 2008 could be either 150.000 HUF (approx. 762 USD) or 900.000 HUF (approx. 4575 USD).

The readiness to initiate a legal remedy procedure has been fluctuating between 20-25% since 2004; in 2008 a legal remedy procedure was initiated in 16% of the cases. (This figure is difficult to calculate, it can so far be related to the successfully completed procedures). More than half of our respondents see the readiness to initiate a legal remedy procedure as high or too high. This means, that every 5th or 6th procedure concludes in a remedy procedure, which depending on the value of the particular procurement can be quite a long process before the Public Procurement Arbitration Board and, in certain cases, before the court.

Based on the responses it can be concluded, that the respondents are rather dissatisfied with the practice of the legal remedy system, however this cannot be the only reason for them leaving the market. One further reason for this behaviour might be the fact, that in certain cases the utility companies are subjectively sanctioned to pay higher fees by the remedy authorities, however we do not have exact data to substantiate this claim. During our research, the public utility companies took into consideration that the expenses increased due to the advertisement control fee that has to be paid before launching the purchasing procedures. Mandatory application of the official public procurement consultant as well as the fee of the so called transparency commissioner significantly increase expenses that might also be the reson of withdrawal.

In-house Procurement

There is no exact definition for public tasks, or public service neither in the guidelines nor in the Hungarian Public Procurement regulations. In everyday parlance we can regard certain local government activities, such as landscaping, maintenance, or any technical supervising as public serving, since the contracting authority itself provides public service. The in-house procurement is the real problem, which makes it possible for the local government to prefer exclusively its own company, if it is directly controlled by the local government and 90% of the income of the company can be expected from the owner (or owners).

However, this rule applies only for public services, and in creative interpretation it can mean that generally the local government is not obliged to use public procurement for its own company. As a result, local governments tend to commission their

own companies directly, without using public procurement, so then their own company itself (PPL &22 (1)) should be using public procurement, but that is not always the case. However, with recent budget restrictions and due to the described practice above, the public procurement spending of the local governments has decreased by more than 50%, from the annual 536 billion HUF (approx. 2.724.961.870 USD) to 236 billion HUF (approx. 1.199.796.644 USD).

Applicability of Procurement Criterias

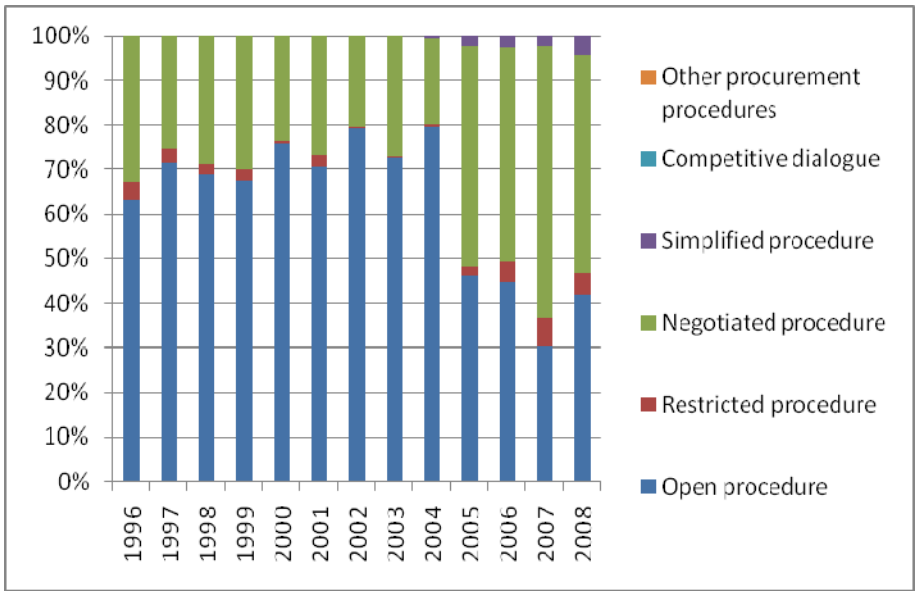
There is an opposition against using procurement-focused, creative solutions in the Parliamentary Report of the Public Procurement Council and in the everyday practice of the NFÜ (National Development Agency) as well. Their aim is to influence competition by suppressing negotiating procedures, which – in their opinion – cannot be regarded as reasonable in the view of procurement. The fear of corruption has led the decision makers to try to minimise direct contacts between the contracting parties, i.e. they do not support negotiating procedures.

Present data show that, as a result, the number of negotiating procedures fell sharply between 2007 and 2008, i.e. from 931 billion HUF (approx. 4.733.096.085 USD) to 690 billion HUF (approx. 3.507.880.020 USD). So, the effect is obvious, the market players disregard the advantages of the negotiating procedures and look for risk-minimising solutions, where although the competition can develop in its pure form without any communication, but there is no direct information exchange between the tenderers, so the particular details of the completion cannot be clarified, and as a result, the contracting authority has to commission the given object of the procurement without any changes, even if it turns out later, that the original parameters and conditions of the completion were badly defined.

Figure 4

Public procurements according to different procedure types based on the value of the procurement

(1996-2008)



Small and Medium Enterprises

The situation of SMEs – based on voluntary information and summarised by the Public Procurement Council - which were successful in public procurement has also been touched upon. Figure 5 shows that although about 70% of the procedures are won by SMEs, but they can use only less than 40% of the whole procurement value. Whereas large companies based in Hungary that won only less than 30% of the procurement procedures can use more than 60% of the whole procurement value. So it is obvious that large companies have a certain advantage as far as competition is concerned, but apart from the basic statistics of the Parliamentary Report we do not have more comprehensive information about the procurement value and procurement objects.

Figure 5

Public procurements according to different types of contracting authorities based on the number of procedures (1996-2008)

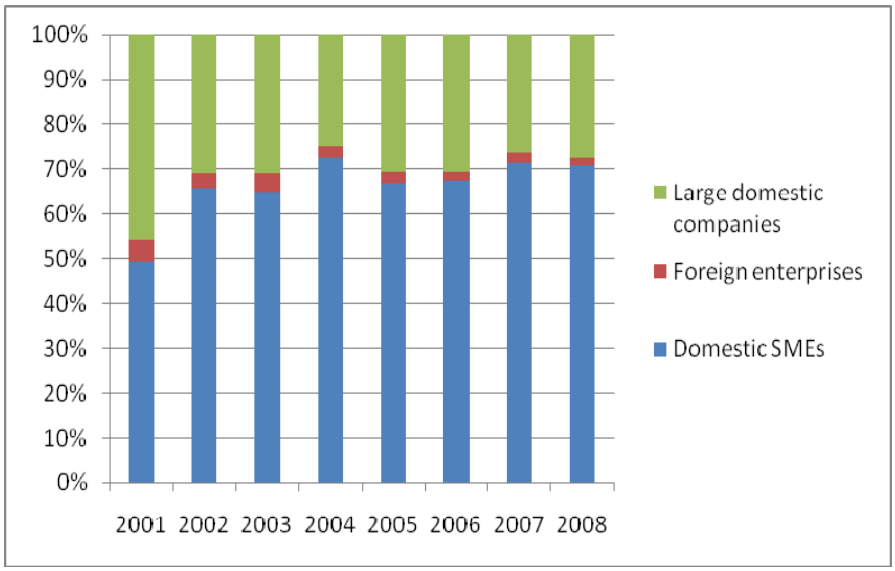
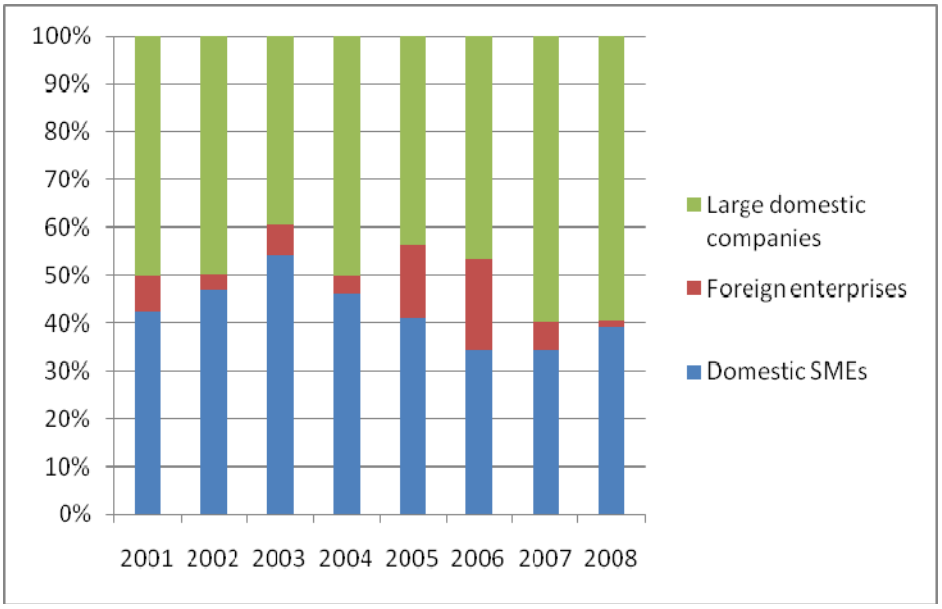


Figure 6

Public procurements according to the different types of contracting authorities based on the value of procurement (1996-2008)

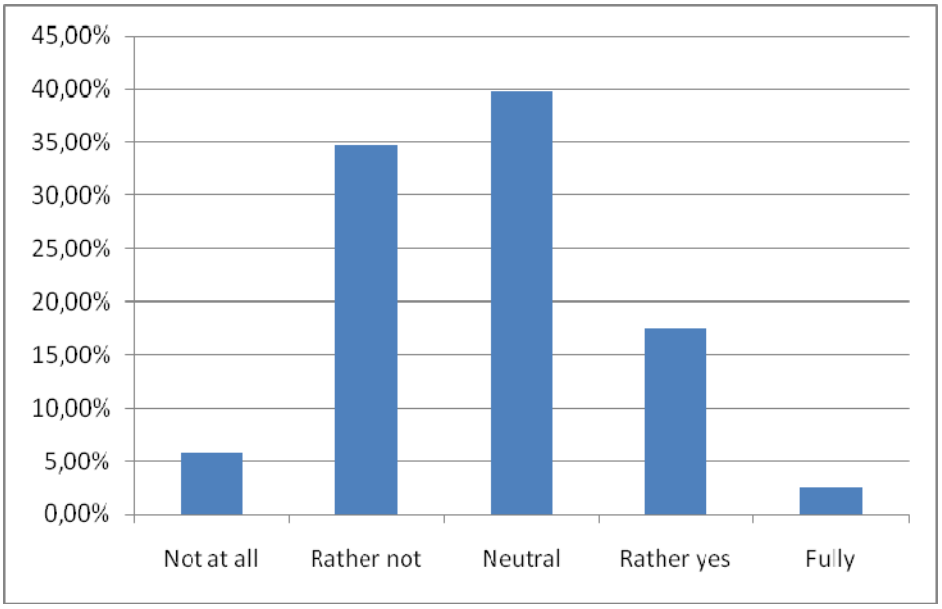


Moral and Efficiency in Public Procurement

The 2009 research at Budapest Corvinus University on the ”Moral and efficiency in public procurement”[4] featured several questions directly regarding the relation between public procurement and competition. One of the most interesting questions intended to learn how and in what extent public procurement regulations let market processes freely develop. According to most of the respondents these expectations are badly or not sufficiently satisfied by public procurement regulations.

Figure 7

In your opinion in what extent public procurement regulations let market processes freely develop?



When asked if public procurement helps competition or hinders it, ¾ of the respondents judged public procurement as not really helping competition. Compared to 2007 data recent statistical data show a grimmer picture about the ability of public procurement to hinder unfair competition.

Figure 8

Does public procurement help competition or hinders it?

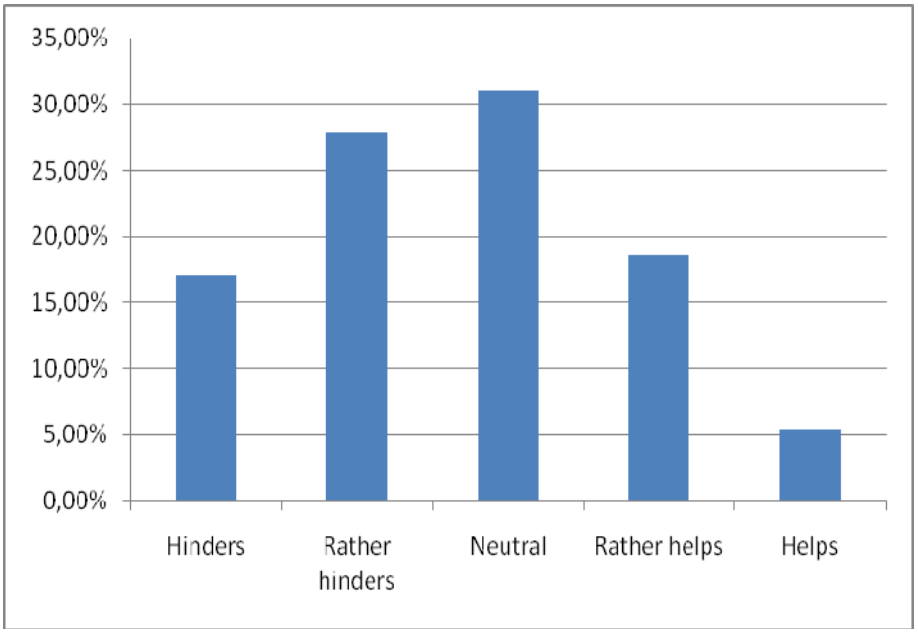
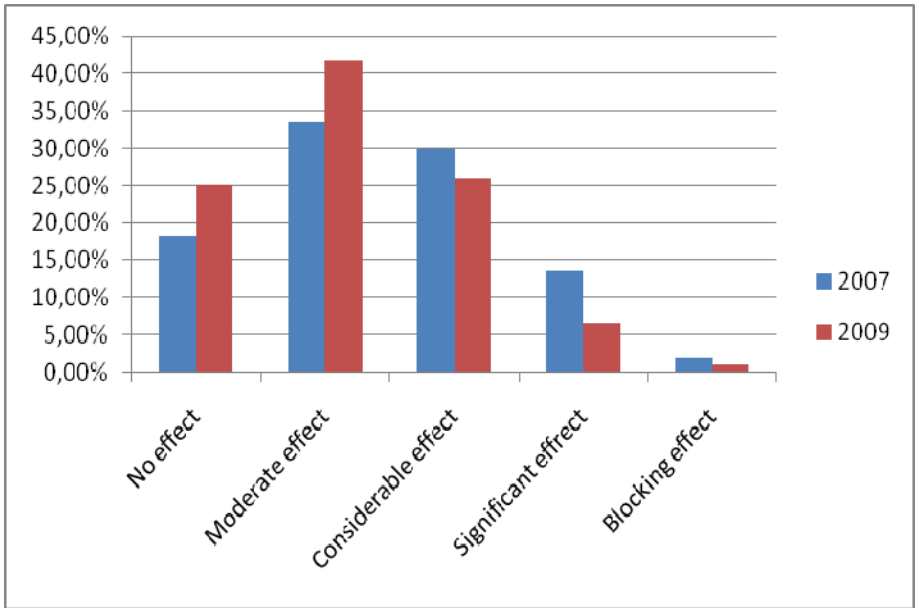


Figure 9

In what extent can public procurement hinder unfair competition?



As shown in Figure 9, compared to 2007 data according to the dominant opinion public procurement regulations can hinder unfair competition only marginally, and they are seen as genuine hindering factors only by the minority. Among the questions concerning morality the question about the extent of morality of the players showed, that both, the contracting entities and tenderers are rather considered less or not sufficiently moral than moral or fully moral.

As far as the extent of corruption is concerned, the most negative answers were given about the constructing projects, and the results are also negative regarding the high estimated value procurements. According to the respondents the main factors regarding corruption are: procedure preparation, critical evaluation, completion stage, making the final offer, signing the contract and finally the legal remedy process.

About the questions regarding corruption it can be generally stated, that the opinion of the respondents is rather negative about the moral of the players on the public procurement market, and this also shows that there are a wide range of opportunities for exercising unfair influences on competition.

Among the positive examples the electronic auction should definitely be mentioned, which makes the competition more transparent and dynamic, and in procurement parlance it indicates the spread of reverse auctions. In 2009 compared to 2007 data 5% more respondents had seen electronic auction than in 2007, i.e. 37%.

CRISIS AND MODERNISATION

According to our initial assumption the extensive law modification with its legal effect in 2009 in the middle of the economic crisis indicates a kind of protectionism in public procurement, although in many cases it resulted in the opposite effect. Good examples of this are the changes intended to support SMEs in 2008 – usually initiated in the form of individual motions in the Parliament -, a number of which had to be rectified in 2009 by the legislation.

The legislation process itself was characterised by accepting ad hoc ideas from legislative, interest protecting and lobby organisations. The insufficiently prepared changes in the regulatory environment and the lack of identifying the interconnections of new regulations led to a number of bad decisions, a part of which had to be swiftly modified. As a result, the soundness of the legal environment has been further weakened, which created a serious problem for the entrepreneurs and for the tenderers who have already been hindered by the crisis and had insufficient resources.

The crisis also resulted in a forced modernisation, a kind of escaping into the future thanks to the initiative of the State Reform Committee, without considering any details. For example, the players of the public procurement markets all agreed, that introducing electronic public procurement – which in this particular form does not exist in any European country – should be a desirable objective, nevertheless a wide range of concerned parties had not been prepared for its mandatory introduction. In our opinion this results in further legal insecurity, and provides an advantage for larger and informatically better prepared tenderers, as well as causing the less prepared tenderers to fail the procedures in greater numbers.

In the following section we analyse the landmarks and major tendencies of the years of 2008 and 2009, emphasizing the relevant factors influencing competition.

Public Procurement as a Tool Serving the Budget

Due to the economic crisis and the government's efforts handling the budget deficit, i.e. how to cut spending, the 1132/2009. (VIII.7.) government decree set up a new supervising body for monitoring the necessity of public procurement procedures. According to the new regulation, from 24 August 2009 certain public companies, such as the Hungarian Railway and the Hungarian Post Office are obliged to consult this monitoring body before initiating a public procurement procedure, if the value of the procurement is above 50 million HUF (approx. 254,194 USD). The decree defines the group of organisations concerned quite widely. It is interesting to note that some procurements, which are exempt from the PPL, including national security procurements, are also belong to this group.

The members of the monitoring team have to overview the procedure summaries, which further increases the administrative burdens of the contracting authorities.

The next step was the 1003/2010.(I.19.) government decree about the moratorium concerning public procurement, which made mandatory for the wide range of organisations that "they can advertise only those public procurement procedures, where the final decision of the contracting authority can be made after the appointments of the ministers of the new government."

The decrees above are quite controversial concerning their public procurement professionalism, legality, and especially the range of organisations concerned, and suggest, that public procurement has been used as a tool serving the short-term interests of the budget. These regulations hinder the competition for spending public money, increase the amount of unlawful spending and, as a result, they can

jeopardize the efficiency of future public procurement procedures and, due to their urgency, can hinder correct competition.

Protectionism and SME-support

The new regulations with the effect from 1 April 2009 provided certain advantages for SMEs and hindered unlawful decisions of contracting authorities, and, as a result, opened new doors, which in certain cases made tenderers reach background agreements.

There was a particular new regulation – which was already withdrawn in October – which for half a year made competition impossible: “304. § (2) The tenderer or tenderers should teljesít perform 50% of the procurement value themselves.”

Due to the disharmony of modified regulations there is a new rule according to which the tenderers cannot make an offer together with other tenderers in the same procurement procedure, cannot participate in it as a subcontractor of another tenderer, and cannot provide resources for another tenderer. In the same public procurement procedure a particular individual or organisation cannot appear in more than one offer of different tenderers as a subcontractor or resource provider if the value of their services is above 10% of the whole procurement value.

For half a year this rule demanding 50% of own performing resulted in the fact, that it was impossible to lawfully use public procurement for example for a taxi service or for organising package tours, since only those could participate, who could independently perform themselves, and, as a result, taxi companies and travel agencies, i.e. a whole range of market players were excluded from the competition.

However, after withdrawing this rule, it is still the case, that those market players whose involvement is unavoidable in the procedure, such as a sole proprietor of a patent or a particular technology, can be involved as a subcontractor or resource provider only if there is only one tenderer, which obviously limits the competition.

It clearly shows, that these unreasonable regulations, which in principle were intended to help SMEs, in practice have had the opposite effects, i.e. have been against SMEs and have hindered competition. The present limitations are unreasonably narrow the options of the market players.

Failed Procedures

The new regulations in 2009 created a new condition of successful completion for the procedures of EU threshold. Namely, that the contracting authorities can declare the procedure invalid, if

there is only one tender-offer, even if it is valid. It is also mandatory to declare the procedure invalid, if there are more tender-offers, but there is only one, which is valid.[5] The rule originally intended to protect the tenderers, because it does not allow excluding all the tenderers but one.

However, this new rule negatively effects those contracting authorities, which rightfully excluded all but one tenderer, and also the tenderer, who in principle won, but could not have a contract, because his competitors, having seen the winning offer at the disclosure of the procedure, did not provide missing information (did not correct formal mistakes and declaration mistakes) in order to make the procedure invalid.

As a result providing missing information has gained a special price on the public procurement market, moreover, there have been some cases, where the tenderer declared his own offer invalid in order to make the whole procedure invalid. Obviously, the expected effects of the new rule had not been properly calculated by the legislator and it caused substantial damages in public procurement procedures.

Forced Publicity

In order to insure the publicity of public procurement procedures[6] the contracting authority has to publish advertisements, guidelines, the full content of the contracts, completion and legal remedy data, etc. concerning the particular procurement procedure, on its homepage, or if it does not have one, on the homepage of the Public Procurement Council.

Initially the rule demanded parallel publishing on the own homepage and on the homepage of the Public Procurement Council as well. Another unreasonable rule was also very short-lived, which demanded the mandatory publishing of the full content of the winning tender. This rule could be complied with only if the tender was received in electronic format.

As a conclusion it could be said, that the publicity rules are well beyond the European practice, where beside the public advertisements and guidelines only the most important parts of the contracts should be electronically published.

The mandatory publishing of the full contract (and the winning tender) has some competitive disadvantage for two groups concerned. On the one hand, by publishing contracts the competitors could gain important information about the particular contracting authority, which could have negative effects on its competitive position, since the contracting entities include such players as Hungarian Post Corp. or Hungarian Oil Company. Among the procurement objects we can

find anything from money delivering contract, to catheter purchasing and IT systems specifications. This approach, which disregards the particular characteristics of contracting authorities and procurement objects, obviously has a negative effect on competition, especially in the case of utility companies, which could be operating in a competitive industry; further more, publishing of the sometimes very costly contracts makes it possible to simply copy them.

The publicity rules obviously were incorporated into the legislation in order to combat corruption, but disregarded the extensive administrative burdens for the contracting entities to insure continuous publicity, and wanted to utilise a non-existing service of the Public Procurement Council in publishing data. The results of forced publicity are controversial. All the advertisements and guidelines had already been made public beforehand, but making mandatory the structured data publishing for everybody ignores the lack of resources at the local governments, and by unnecessarily duplicating data it introduces a new risk factor into the procurement procedure of the contracting authority and makes it more vulnerable.

Forced Modernisation

Based on the suggestion of the State Reform Committee there was a new rule introduced with the effect from 1 January 2010, which made it mandatory in EU threshold procedures to conduct an electronic procedure from the initial advertisement to the tender-offer and to the summary. However, this legislation states only the obligation, and fails to define those particular rules, which could have made it possible to use electronic procedures. So in principle it has become possible to use electronic public procurement, but in practice it has caused serious difficulties for the organisations concerned. Although in 2009 there was a suggestion to set up a Public Interest and Public Procurement Office, which would have postponed the introduction of the mandatory electronic procurement, nevertheless the problem has not been dealt with by the legislator and it has caused serious damage especially for the contracting authorities using EU-subsidies, and for two months it hindered the proper work of the public procurement market.

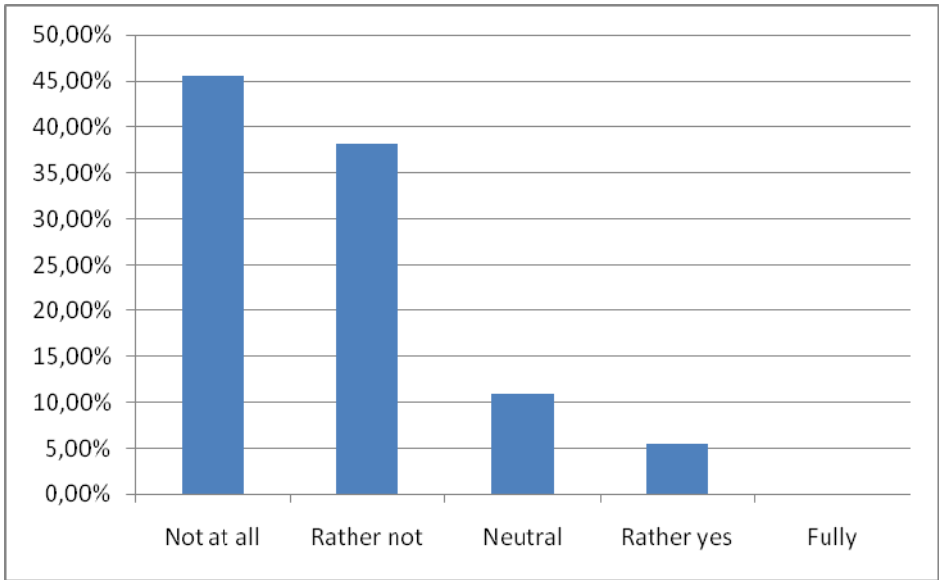
By making mandatory the electronic public procurement the legislator has deformed the unprepared market and competition, and suppressed the contracting authorities having weak IT support, and resulted in further legal insecurity on the market. The new Office eventually has not been set up and the mandatory electronic public procurement was withdrawn at the last session of the Hungarian Parliament before the new elections, after two months of total insecurity.

Unsustainable Sustainabilty

The next achievement of the forced modernisation has been the mandatory regulation of sustainable development. Our studies show, that the level of domestic green public procurement in Hungary is very low, which is clearly indicated by the Figure below.

Figure 10

In what extent can our public procurement be regarded as green?



Beyond these results the government decree about constructing projects has also been modified[7], which lists a number of mandatory criteria for evaluation and suitability, ignoring the relevant EU guidelines. Further more it makes mandatory to use a so-called „budget announcing software", which for a long time was not available for the users.[8] Presently there are two types of mandatory software, which are free only for the contracting authorities, but not for the tenderers.

The Parliament with its decree on „The necessary measures to combat the effects of recession concerning the constructing industry and its linked sub-industries as a result of the general economic crisis" 36/2009. (V.12.) OGY, urged the government to prepare immediate-, short- and mid-term measures in order to handle the new challenges faced by the constructing, building material and estate development industries.

It resulted in a new package law on „The quickening of constructing projects II.” Included in this a government decree (191/2009. (IX.15.)) was declared about constructing operations, which introduced the institution of security management in order to reduce circular debts.

The decree defines in details the procedure of payments made by the main contractor to the sub-contractors. This regulation of payments is quite complex, and assumes as a precondition an IT background, which most of the SMEs simply do not have. With this regulation, although the task of reducing circular debts was also present in the PPL, the legislator jeopardised the market positions of SMEs.

Besides promoting transparent completion the decree contains mainly unrealistic rules, which can only be complied with by businesses, which can finance extensive administration. So the modernisation has become a competition-distorting factor.

SUMMARY

The Hungarian Public Procurement history, which has had an unchanged institutional system since 1996, and which since joining the EU in 2004 has had an ever-changing regulatory system is characterised by the gradual escape of the market players. Due to the economic crisis the Hungarian public procurement market has been used as a tool for reducing public spending, and as a result it is in a double squeeze. On the one hand, it was the postponing of public procurements; on the other hand it was the swift and forced modernisation, which the legislator considered as a solution to reach its changing and complex aims. Whether it was the support of the SMEs due to the economic crisis, or reducing circular debts, or insuring some securities for sub-contractors, or even the introduction of mandatory publicity and more difficult administration in order to combat corruption, the public procurement market had to serve a huge variety of tasks. The public procurement used as a crisis management means reached its peak with the official confirmation of public procurement procedures and with the moratorium on public procurements, and it was further hindered by the mandatory electronic procurement. The hectic lawmaking and ad hoc ideas have been quickened by the crisis, and caused statistically tangible damages to a country having serious financial difficulties. However, the shock experienced by the public procurement profession will not disappear without consequences, and the market players due to their expectations and recent experiences will become even more risk-avoiding and less creative, which cannot really be the genuine objective of public procurement.

NOTES

[1] Based on Parliamentary Reports of the Public Procurement Council (1996-2008) and the Report of the State Spending Control Committee on the System of Public Procurement (2008)

[2] The nominal value of procurement has declined; in 2006 it was 1,686 billion HUF, in 2007 1,521 billion HUF and in 2008 1,418 billion HUF.

[3] Hungarian Forint

[4] These data based on the survey-questionnaire supported by Budapest Corvinus University, Transparency International and Budapest Chamber of Commerce and Industry, and the analysis of the questionnaire was done by *Dr Dániel Füleki, Gergely Sámson and Dr Tünde Tátrai*. Number of respondents: 183. The questionnaire was closed: 10.11.2009.The article refers to two similar surveys done in 2006 and in 2007. The results can be downloaded from www.kozbeszkut.hu and http://phd.lib.uni-corvinus.hu/5/2/tatrai_tunde_en.pdf.

[5] PPL. 92/A. §

[6] PPL. 17/C. §

[7] 162/2004. (V. 21.) Gov. decree on public procurement regulations of constructing projects

[8] „PPL. 8/A § (4) The tenderer is obliged to identify – beside the completion conditions – at least another two conditions as evaluating part-considerations, which are more favourable than the ones defined in the documents, such as: a) quality; b) environmental, climate features; c) maintenance and operating costs; d) length of warranty; e) completion deadline."

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